No. 304

In the Supreme Court of the United States

October Term, 1946

ENGLISH ARBUCKLE CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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CITATIONS

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 991) is reported in 142 F. (2d) 321. The court's opinion on application for rehearing (R. 1012) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered May 22, 1944 (R. 1016). The petition for writ of certiorari was filed July 29, 1944. The jurisdiction of this Court is invoked under

Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 5 of the Federal Trade Commission Act applies to acts which also constitute a violation of the Sherman Act.

2. Whether an agreement to fix and maintain minimum prices is an unfair method of competition within the meaning of Section 5.

3. Whether petitioner was prejudiced or denied a fair hearing by the Commission's refusal to strike from the record copies which one of its investigators had made of certain correspondence of another company, when part of the correspondence in the Commission's file was not made available to petitioner.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, prior to its amendment by the Act of March 21, 1938, 52 Stat. 111, provided in part as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from

using unfair methods of competition in commerce.[1]

STATEMENT

The Federal Trade Commission, in a proceeding begun in 1937 under Section 5 of the Federal Trade Commission Act, entered an order directing Surveying-Drafting-Coaters Section of Scientific Apparatus Makers of America (referred to herein as SDC) and its members to cease from engaging in certain price-fixing activities (R. 1, 10, 826–829). SDC is a trade association composed of companies making products used by surveyors, engineers, and the drafting profession, and, as its name implies, it is one of the sections into which the members of Scientific Apparatus Makers of America, a trade association covering additional lines of activity, are grouped (R. 812–813). Four of SDC's some 40 members filed in the court below petitions for review of the Commission's order (R. 961, 991). Following the court's unanimous approval of the order (R. 991–

[1] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the Act of March 21, 1938, 15 U. S. C. 45. The section as amended provides in part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

1006),[2] one of the four petitioners below filed the present petition for certiorari.

The Commission found the following facts:

In June or July 1932 various manufacturers of products used by surveyors, engineers, and the drafting profession agreed to adhere strictly to the prices and other terms of sale shown in a list of prices prepared by the petitioner, Eugene Dietzgen Company, these prices being substantially higher than those at which sales were then being made (R. 815). Between November 1933 and May 27, 1935, the members of SDC conducted their business in accordance with a code of fair competition approved under the National Industrial Recovery Act. When the Act was declared unconstitutional they agreed to continue in force, subject to rewriting "in a legally acceptable form", the code's requirement that price lists be filed with SDC and that no one should sell at lower prices or on more favorable terms than those set forth in his filed price list (R. 816–817).

The substitute rule adopted, as modified in June 1936, was that no sale be made "at less than the lowest net price filed and published by any member" (R. 817–818). Other rules fixed maximum cash discount, prohibited contracts covering a period

[2] The judgment which the court entered affirmed the Commission's order with a minor clarifying amendment (R. 1016–1019).

of more than one year, and otherwise gave assurance against variation from published prices and terms (R. 818–819). SDC was active in securing observance of its rules (R. 819). As a result of the foregoing agreements and practices, competition between SDC members, who prior to June 1932 were active competitors, has been eliminated (*ibid.*).[3]

The 11 members of SDC named as respondents in the Commission's complaint (including petitioner) have agreed to fix and maintain the prices at which they sell; not to sell at prices or on terms more favorable than those contained in any price list filed with SDC; not to make contracts for a period longer than one year; to fix and maintain uniform terms of sale, including classification of customers and freight allowances; and to file with SDC schedules showing their prices and other terms of sale (R. 823–824). Pursuant to agreement and understanding, members have, in addition, exchanged information among themselves regarding prices and terms of sale to be submitted by them when bids are requested (*ibid.*).

The Commission concluded that these acts and practices constituted unfair methods of competition in interstate commerce (R. 825–826).

[3] In numerous instances SDC members (sometimes as many as 14 of them) submitted bids identical in amount (R. 820–823).

ARGUMENT

I

Petitioner contends (Br. 6–13) that acts which constitute a violation of the Sherman Act, as those of the SDC members obviously did, are not within the purview of the Federal Trade Commission Act. This Court has held to the contrary. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, 61–62, upheld provisions of an order under the latter act directed against price-fixing agreements. In *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 463, also a proceeding under the Trade Commission Act, the Court said that if the practice of a combination "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." The Court in that case said (p. 465) that the Commission's findings brought the combination against which its order was directed "well within the inhibition of the policies declared by the Sherman Act itself", and the Court set forth (pp. 465–466) the many respects in which the acts of the Guild members constituted action prohibited by the Sherman Act. See also *Federal Trade Commission* v. *Beech-nut Packing Co.,* 257 U. S. 441, 453–455.

Petitioner states, as we concede, that the Commission is not authorized to enforce the Sherman Act, and petitioner contends (Br. 14–23, 31–32)

that application of the Trade Commission Act to conduct which violates the Sherman Act represents an unauthorized attempt by the Commission to enforce the Sherman Act. But conduct which violates the Trade Commission Act does not cease to be such because it also violates the Sherman Act.[4] A proceeding against such conduct under the former statute is not a proceeding to enforce the latter.

II

Petitioner contends (Br. 23–25) that a combination to maintain minimum prices is not injurious to the competitors of those combining and therefore is not an unfair method of competition within the meaning of the statute. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, is a directly contrary holding. Although the point now raised was not discussed in the opinion in that case, it was carefully considered and rejected in *California Rice Industry* v. *Federal Trade Commission,* 102 F. (2d) 716, 720–722 (C. C. A. 9).

Petitioner bases its contention upon *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.[5] It was there held that the word "competi-

[4] It is elementary that the same conduct or transaction may be a violation of two statutes and may be prosecuted under both even when both are criminal. *Gavieres* v. *United States*, 220 U. S. 338; *Blockburger* v. *United States*, 284 U. S. 299.

[5] Cf. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149.

tion" imports the existence of actual or potential competitors and that the Commission is without jurisdiction to enter an order under Section 5 of the Act in the absence of evidence showing or tending to show the existence of competitors affected by the practices involved in the Commission's complaint. In the present case, however, there is a finding that before the summer of 1932, petitioner and other members of SDC were in active and substantial competition with each other and with other members of the industry, but that since the adoption of the restrictive price-fixing practices, competition has been eliminated (R. 819). Since the *Raladam* case is therefore inapplicable, there can be no doubt that the maintenance of minimum prices by former competitors infringes upon the economic freedom of members of the industry to choose, for example, to sell in greater volume at lower prices.

We submit that it clearly is unfair within the meaning of the statute to use in competition a means or method of trade (price fixing) which Congress in a related federal statute has declared unlawful. *United States* v. *Socony-Vacuum Oil Co.*, 312 U. S. 150, 212. Furthermore, the meaning of the word "unfair" is to be interpreted in the light of the provision in Section 5 that a proceeding may be brought thereunder only if the Commission finds it to be "to the interest of the public". As this Court said in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 27, the purpose of such a proceeding "must be protection of the

public. The protection thereby afforded to private persons is the incident." Surely it is in the public interest to prevent agreements under which lower prices are banned.

III

Petitioner contends (Br. 27–31) that it was denied a fair hearing. The Commission introduced in evidence (Exhibits 155–159) copies of five letters (one written in 1932 and four in 1933) made by an investigator for the Commission from the correspondence files of the Frederick Post Company, an SDC member (R. 452–456). The Commission refused to make available for inspection its file containing copies which the investigator had made of other correspondence of the same company (R. 457–459), and on this ground, petitioner moved to strike the five letters introduced by the Commission. Prior to the Commission's hearing, this company had destroyed its correspondence files for the years 1932 and 1933 (R. 313–315).

Petitioner makes no showing that it was in any way prejudiced by the action to which it objects. Only one of the five letters was to or from petitioner (R. 454) and it may not be presumed in the absence of evidence to the contrary that petitioner did not have this letter, together with any other correspondence pertinent thereto, in its own files. Furthermore, what took place in 1932 and 1933, while of some historical interest, is only remotely relevant to the issue raised by the Com-

mission's complaint, filed in 1937: whether the SDC members were using any unfair methods of competition in interstate commerce. Where, as here, there is no serious challenge to the sufficiency of the evidence to support the findings of the Commission, the matter complained of is merely a minor evidentiary ruling which does not merit review by this Court by way of certiorari. The court below did not consider this matter of sufficient importance to be referred to in its opinion, though it carefully considered seven other issues presented by the petitioners below (R. 991–1006).

CONCLUSION

The ruling below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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